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No. 02-311

Supreme Court, U.S.
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In The
Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

SEWALL SMITH, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE CONSTITUTION PROJECT AS AMICUS CURIAE SUPPORTING THE PETITIONER

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PA. CONS. STAT. § 9711 (1998) 26

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ABC News, May 7, 2002, *available at* http://abcnews.go.com/sections/us/DailyNews/deathpenalty_poll020507.html (last visited Jan. 6, 2002) 25

Gallup News Service, May 20, 2002, *available at* http://www.gallup.com/poll/topics/ (last visited May 20, 2002) 26

Laura S. Underkuffler, *Agentic and Conscientic Decisions in Law: Death and Other Cases*, 74 NOTRE DAME L. REV. 1713, 1726-28 (1999) 27

BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PUB. NO. 197020, CAPITAL PUNISHMENT 2001 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf 2, 26

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INTEREST OF AMICUS CURIAE

The Constitution Project respectfully submits this brief in accordance with Supreme Court Rule 37.3.[1] The Constitution Project is a nonprofit bipartisan organization that seeks to build consensus and develop solutions to contemporary legal and constitutional issues through a unique combination of scholarship and public education.[2] The mission of the Constitution Project is to promote constitutional dialogue in settings outside the judiciary.[3] To further this mission, the Project creates bipartisan

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus curiae, its members, and counsel made a monetary contribution toward the preparation or submission of this brief.

[2] The text describing the Constitution Project, its mission and initiatives, was largely taken directly from its website and publications. *See* http://www.constitutionproject.org (last visited Jan. 6, 2003).

[3] The basic premise of the Constitution Project is that in the practice of ordinary politics constitutional issues are neglected, and there is an over reliance on the courts to resolve constitutional debates. All too often, legislators and executive officers assume that the theoretical existence of judicial review means that they need not think in a serious way about constitutional issues. Responsibility for constitutional debates and decision-making rests not only with the courts, but also with elected officials. Yet often, legislators are heard to advocate "letting the courts decide" whether proposed legislation is constitutional. Exclusive reliance on judicial review ignores that our Constitution ultimately stems from – and belongs to – the people as a whole. In the long run, the Constitution cannot be preserved as a relevant influence on our politics and policies unless the people are regularly engaged in constitutional discourse and decision-making. As Americans, we are all decision-makers when it comes to the Constitution, and the Project empowers citizens to make the decisions our democratic system demands of them and it reminds them of the ways and extent to which our Constitution matters.

blue-ribbon committees comprised of former government officials, judges, scholars, and other prominent citizens to reach across ideological and partisan lines, and divides among the executive, judicial, and legislative branches. The committees seek to build consensus on issues that the courts cannot resolve, and to develop guidelines designed to make constitutional issues a part of ordinary political debate. Then, based on these consensus positions, the Project promotes public education and grassroots efforts to encourage serious constitutional dialogue in a variety of settings.[4]

A. The Death Penalty Initiative

In May 2000, the Constitution Project created the Death Penalty Initiative to address the disturbing risk that Americans were being wrongfully convicted of capital crimes and sentenced to death.[5] A thirty member blue-ribbon committee was convened to examine the current capital systems in place throughout the country and recommend ways to ensure fundamental fairness and justice for all by improving procedural safeguards. The members of the committee are supporters and opponents

[4] The Constitution Project currently has five active programs: The Liberty and Security Initiative; The Death Penalty Initiative; The Election Reform Initiative; The Courts Initiative; and The Constitutional Amendments Initiative.

[5] Since the death penalty was reinstated in 1976, one hundred and two persons sentenced to death were later exonerated, while eight hundred and twenty were executed. *See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PUB. NO. 197020, CAPITAL PUNISHMENT 2001 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf.

of the death penalty, Democrats and Republicans, conservatives and liberals, former judges, prosecutors, defense lawyers, public officials, scholars, journalists, victim advocates, and other concerned Americans.[6] The members

[6] The following persons comprised the committee: Virginia E. Sloan, *Executive Director, the Constitution Project*. **Co-Chairs:** The Honorable Charles F. Baird, *former Judge, Texas Court of Criminal Appeals*; The Honorable Gerald Kogan, *former Chief Justice, Supreme Court of the State of Florida and former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida*; Beth A. Wilkinson, *Prosecutor, Oklahoma City bombing case*. **Members:** The Reverend James E. Andrews, *Stated Clerk (retired), Presbyterian Church (U.S.A.)*; William G. Broaddus, *former Attorney General, Commonwealth of Virginia*; David I. Bruck, *Capital Defense Counsel*; The Honorable Robert J. Burns, *retired Judge, Jefferson Parish, Louisiana*; W. J. Michael Cody, *former Attorney General, State of Tennessee*; The Honorable Mario M. Cuomo, *former Governor, State of New York*; The Honorable John J. Gibbons, former *Chief Judge, U.S. Court of Appeals for the Third Circuit*; Thomas A. Gottschalk, *General Counsel, General Motors Corporation*; Charles A. Gruber, *former President, International Association of Chiefs of Police*; Cardinal William H. Keeler, *Archbishop of Baltimore*; Paula M. Kurland, *Victim Advocate and Office Manager, Crime Prevention Institute*; David Lawrence, Jr., *President, Early Childhood Initiative Foundation and former Publisher, Miami Herald and Detroit Free Press*; Timothy Lynch, *Director, Project on Criminal Justice, Cato Institute*; The Honorable Abner J. Mikva, *former Member of Congress (D-IL), former Chief Judge, U.S. Court of Appeals for the D.C. Circuit, and former White House Counsel, Clinton administration*; Sam D. Millsap, Jr., *former District Attorney, Bexar County, San Antonio, Texas*; The Honorable Sheila M. Murphy, *former Judge, Sixth District, State of Illinois; Executive Director, Illinois Death Penalty Education Project*; Dr. LeRoy Riddick, *Forensic Pathologist*; Chase Riveland, *former Secretary, Department of Corrections, State of Washington*; Laurie O. Robinson, *former Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Clinton administration*; The Honorable Kurt L. Schmoke, *former Mayor, City of Baltimore, Maryland and former State's Attorney, State of Maryland*; The Honorable William S. Sessions, *Director, Federal Bureau of Investigation, Reagan and Bush administrations and former Chief Judge, U.S. District Court for the Western District of Texas*; G. Elaine Smith, *Past*

(Continued on following page)

brought a wide array of philosophies, experiences, and perspectives to the committee.

The committee's mission statement provides that individuals who commit violent crimes deserve swift and certain punishment. All the committee members agreed that no one should be denied basic constitutional protections, including a competent lawyer, a fair trial, and full judicial review of conviction and sentence. The denial of any of these protections heightens the danger of wrongful conviction and sentence.

The committee found that the dramatic increase in the number of persons released from death row because they were innocent deeply disturbing. The committee determined that too often, cases of wrongful conviction involve defense lawyers who lacked the appropriate experience and resources, were under the influence of

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President, American Baptist Churches, USA; Jennifer Thompson, *Spokesperson, Center on Wrongful Convictions*; The Honorable Vin Weber, *former Member of Congress (R-MN)*; John W. Whitehead, *President, The Rutherford Institute*; Rabbi Eric H. Yoffie, *President, Union of American Hebrew Congregations*. Individual member biographies can be found at http://www.constitutionproject.org/dpi/members.html. **Reporters:** Professor Susan Bandes, *DePaul University College of Law, Chicago, IL*; Professor Robert P. Mosteller, *Duke University School of Law, Durham, NC*; Professor Stephen Saltzburg, *The George Washington University Law School, Washington, DC*. **Social Science Consultant:** William J. Bowers, Ph.D., *College of Criminal Justice, Northeastern University, Boston, MA*. **Contributors:** Time and funds were generously contributed by the law firm of Latham & Watkins; Professor Samuel Gross, *the University of Michigan Law School*; James Liebman, *Columbia Law School*; Thomas Kerner and Marlaine Williams of the law firm of William Cutler & Pickering; the Open Society Institute; Deer Creek Foundation; Arca Foundation; Columbia Foundation; and Vietnam Veterans of America Foundation.

alcohol or drugs, or simply slept through parts of the trial. The number of defense lawyers involved in capital cases who were subsequently disbarred or cited for serious ethical violations is shockingly high. The flaws in the current system have been illuminated by scientific advances in DNA evidence, but that society cannot be assured that the current system, even with DNA evidence, can catch or correct all errors.

Finally, the committee concluded that the current system serves no one adequately – not the victims, not defendants, and not society. The systems' delays and mistakes prevent victims from experiencing finality and closure. Moreover, when the innocent are convicted, we fail to bring justice to the guilty, creating a continued threat to public safety and an enduring tragedy for the victim's family.

The goal of the Death Penalty Initiative is to recommend additional safeguards to an existing system that is unable to prevent errors and injustices. Several of the recommendations are addressed to those who occupy critical roles in the capital punishment system, including the defense attorneys, the prosecutors, the juries, the trial judges, and the reviewing courts. The recommendations emphasize that each person has the individual responsibility to ensure that justice is done in all cases.

B. The Death Penalty Initiative's Eighteen Reforms

The committee issued a report suggesting eighteen reforms essential to a death penalty system founded on fairness and justice. Three of the Eighteen Reforms deal with the competency of counsel and will be mentioned

here.[7] First and foremost, counsel should be effective. Jurisdictions that impose capital punishment should create an independent authority to screen, train, supervise, and appoint lawyers to represent defendants charged with a capital crime.[8] Second, capital defense lawyers should be adequately compensated, and the defense should be provided with adequate funding for experts and investigators. Third, the Supreme Court should replace the *Strickland* standard with a standard requiring professional competence in death penalty representation.

STATEMENT OF THE CASE

Amicus adopts the statement of the Petitioner, except to emphasize a few important facts the Court should consider in reaching its final decision in this case.

The lead defense attorney in this case, just after being appointed, had taken a new job in another Maryland county.[9] Thereafter, the lead attorney spent little time on the case, and left an attorney in charge who had only worked on a few felony trials and never on a death penalty

[7] To read about the remaining fifteen reforms and for a copy of the full text of the Project's suggested "Eighteen Reforms" *see* http://www.constitutionproject.org/dpi/MandatoryJustice.pdf (last visited Jan. 6, 2003).

[8] *See infra* note 33 (regarding the Illinois Capital Bar and qualifications for certification to try capital cases).

[9] Joint Appendix (JA) 472-476. The lead attorney was later discharged from his position as a public defender. *Id.*

trial.[10] After trial but before sentencing, both attorneys failed to conduct any meaningful investigation into potential mitigating evidence, despite the fact that it is "a routine practice in the Maryland Public Defender's Office," and that funds were available to hire an expert to prepare a social history.[11] Rather, each of the attorneys thought the other was responsible for investigating and preparing a mitigating case.[12] Thus, the attorneys, without any investigation, made the decision to "re-try guilt" to the sentencing jury.[13] However, that decision was ill-advised because the sentencing jury was repeatedly instructed that Wiggins "had been found guilty of the murder of Florence Lacs in the first degree."[14]

Had counsel bothered to conduct a sufficient investigation for mitigating evidence, they would have found evidence that comported with and supported the argument that Wiggins lacked sufficient culpability to impose the death penalty. Counsel would have found that Wiggins was "borderline intelligent" and possibly mentally retarded.[15] Also, counsel would have discovered the details of

[10] JA 472-478, 485, 514-15.

[11] JA 472-478, 485-88, 514-15, 539-40.

[12] JA 472-488, 514-40. *See also Wiggins v. Corcoran*, 164 F. Supp. 2d 538, 538-39 (D. Md. 2001).

[13] JA 472-478, 485-88, 514-15, 539-40. The decision to re-try guilt in the mitigation phase, according to the lead attorney, was actually made before any evidence was presented in the guilt/innocence trial. JA 485-486.

[14] JA 53, 362. Also, the jury was instructed that: "This conviction is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact." JA 362.

[15] JA 437-439.

Wiggins' horrific childhood, including physical and sexual abuse.[16] Additionally, counsel should have introduced evidence showing Wiggins had no prior criminal record.[17]

SUMMARY OF ARGUMENT

The Court of Appeals of Maryland unreasonably applied *Strickland* to the facts of this case. Counsel's performance in this case was deficient under *Strickland* by failing to conduct a sufficient investigation into potential mitigating evidence. Wiggins' case was prejudiced by the failure to investigate and introduce the available mitigating evidence, as the outcome of the sentencing hearing probably would have been different.

ARGUMENT

I. The Maryland Court Unreasonably Applied *Strickland*

As 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act, applies to this case, the question presented is whether the Maryland Court of Appeals' conclusion "resulted in a decision that is contrary to, or an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 403-13 (2000) (Opinion for the Court in Part

[16] JA 425-443.

[17] JA 17-24.

II by O'Connor, J.). *Strickland v. Washington*, 466 U.S. 668 (1984), was clearly established federal law at the time Wiggins was convicted. The Maryland Court of Appeals unreasonably applied *Strickland* by concluding that counsel's performance was not ineffective despite the failure to investigate available mitigating evidence. *Williams*, 529 U.S. at 391-98.

A. Competent Capital Counsel Is Required to Conduct an Adequate Investigation to Locate and Evaluate Potential Mitigating Evidence

There is a difference between a decision not to *introduce* or *present* mitigating evidence and a decision to simply forgo *investigation* of mitigating evidence. *See Strickland*, 466 U.S. at 699 (finding "the decision not to seek *more* character or psychological evidence" reasonable) (emphasis added); *Darden v. Wainwright*, 477 U.S. 168, 184-86 (1986) (finding "counsel engaged in extensive preparation ... for sentencing" by investigating and consulting with defendant to determine what, if any, mitigating evidence should be presented); *Burger v. Kemp*, 483 U.S. 776, 791 (1987) ("Based on these interviews, Leaphart made the reasonable decision that his client's interests would not be served by *presenting* this type of evidence.") (emphasis added); *Williams*, 529 U.S. at 390-99; *Bell v. Cone*, 122 S.Ct. 1843, 1852-53 (2002).

This Court's decision in *Williams* underscored the existing *Strickland* requirement that counsel in capital cases adequately investigate available mitigating evidence

prior to making a decision to forgo further investigation or not to introduce such evidence in the sentencing hearing.[18] In *Williams*, the petitioner asserted counsel erred in failing to actually investigate and seek records on the erroneous assumption that state law prevented it. *Williams*, 529 U.S. at 369-71. Counsel simply half-heartedly requested the jury show the petitioner mercy. *Id.* Thus, in *Williams*, this Court applied *Strickland* and concluded that counsel's performance was deficient for *failing to investigate* and uncover significant mitigating evidence.

Counsel's failure to investigate the existence of mitigating evidence prejudices a defendant by preventing the jury from considering mitigating evidence which is essential to the fundamental fairness of a capital proceeding. *See Enmund v. Florida*, 458 U.S. 782, 801 (1981); *Lockett v. Ohio*, 438 U.S. 586, 605-06 (1978) (plurality opinion) (opinion of Burger, C.J.); *Gregg v. Georgia*, 428 U.S. 153, 197 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (holding that in capital proceedings, the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense"). The jury is not only permitted but *required* to contemplate the "uniqueness of the individual"

[18] By contrast, in *Bell*, this Court found that counsel pursued a reasonable strategy after *completing an adequate investigation*. *Bell*, 122 S.Ct. at 1852-53. In *Bell*, petitioner claimed error not in counsel's failure to locate and evaluate mitigating evidence; rather, petitioner claimed counsel's performance was deficient for not *recalling* mitigating witnesses who had testified the day before. *Id.* Further, counsel considered the content and potential effect of the available evidence and testimony, and after consultation with the petitioner, elected to pursue a strategy which did not include recalling mitigation witnesses and introducing additional evidence. *Id.*

in determining the penalty. *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982) ("[N]either may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.") (emphasis in original). An attorney's failure to conduct an investigation into those unique attributes of the individual defendant makes the jury's task impossible, as they have no evidence to weigh. The Maryland Court of Appeals' decision to the contrary is clearly an unreasonable application of this Court's precedent. *See Bell*, 122 S.Ct. at 1852-53; *Williams*, 529 U.S. at 390-99; *Burger*, 483 U.S. at 791; *Strickland*, 466 U.S. at 699.

B. Most Courts of Appeals and State Supreme Courts Interpreting *Strickland* Require That Counsel Undertake a Sufficient Investigation for Mitigating Evidence Before Making the Decision to Forgo Additional Investigation or Not Introduce Mitigating Evidence

The vast majority of Federal Courts of Appeals and State Supreme Courts, applying *Strickland*, have required that defense counsel perform a sufficient investigation for mitigating evidence before they will find counsel's decision to forgo additional investigation or not to introduce any mitigating evidence was a tactical decision. Choosing to do nothing in a capital sentencing proceeding is not a constitutionally permissible tactic. Where counsel has notice of *potential* mitigating evidence, but fails to investigate,

counsel has inadequately prepared for sentencing.[19] Counsel cannot weigh the value of presenting a mitigation defense *before* actually investigating the available evidence.[20] Thus, these courts have concluded that the failure to perform a sufficient investigation renders counsel's performance constitutionally ineffective.

There is no question that in some cases, the presentation of mitigating evidence opens the door to harmful aggravating evidence that would more than counteract any benefit the mitigating evidence would have provided.[21]

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[19] *See Moore v. Johnson*, 194 F.3d 586, 615 (5th Cir. 1999) ("*Strickland* does not, however, require deference to decisions that are not informed by an adequate investigation into the controlling facts and law."); *accord Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002); *Lockett v. Anderson*, 230 F.3d 695, 711-14 (5th Cir. 2000); *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997); *cf. Hunt v. Lee*, 291 F.3d 284, 292 (4th Cir. 2002) (acknowledging that in some cases it is the "failure to *investigate*, not the failure to *present*, mitigating evidence that [leads] to the conclusion that the defendant ha[s] been denied effective assistance of counsel.").

[20] In this case, the decision to re-try guilt in the mitigation phase, according to the lead attorney, was actually made before any evidence was presented in the guilt/innocence trial. JA 485-486. *See Lockett*, 230 F.3d at 714-15 (rejecting the state's contention that the decision not to investigate was a "strategic choice," because the purported choice was not informed by an adequate investigation of the available evidence); *accord Neal v. Puckett*, 286 F.3d 230, 243-44 (5th Cir. 2002) (en banc); *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001); *Delaware v. Wright*, 653 A.2d 288, 299 (Del. 1994); *Rose v. Florida*, 675 So.2d 567, 572 (Fla. 1996); *Phillips v. Florida*, 608 So.2d 778, 783 (Fla. 1992); *Turpin v. Christenson*, 269 Ga. 226, 239 (1998); *Illinois v. Morgan*, 187 Ill.2d 500, 541 (1999); *Hodge v. Kentucky*, 68 S.W.3d 338, 344 (Ky. 2002); *Louisiana v. Sanders*, 648 So.2d 1272, 1293 (La. 1994); *Pennsylvania v. Smith*, 544 Pa. 219, 244-45 (1996); *Good v. Tennessee*, 938 S.W.2d 363, 370 (Tenn. 1996).

[21] *See Burger*, 483 U.S. at 792-93; *Fortenberry v. Haley*, 297 F.3d 1213, 1229-30 (11th Cir. 2002). In these cases, however, for the court to

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However, this case is unlike those cases in which counsel declined to present mitigating evidence because it might open the door to aggravating evidence. In this case, there was no possibility of opening the door to aggravating evidence, as Wiggins had no prior criminal record.[22]

Mitigating evidence is crucially important to humanize the defendant and ensure that he receives a proportionate sentence.[23] At the time defense counsel made the decision to not investigate mitigating evidence, they had no reason to believe that mitigating evidence would not have been a viable strategy.[24] Rather, counsel chose to present *existing* evidence relating to guilt, instead of

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find that counsel's assistance was effective, defense counsel was required to identify the specific mitigation evidence it would have used, and to identify the specific aggravating evidence that would have been admitted to rebut it. *See Foster v. Schomig*, 223 F.3d 626, 632-36 (7th Cir. 2000); *Moore*, 194 F.3d at 617; *Dobbs v. Turpin*, 142 F.3d 1383, 1388-89 (11th Cir. 1998).

[22] JA 17-24.

[23] *See, e.g., Bracy v. Schomig*, 286 F.3d 406, 417 (7th Cir. 2002) (en banc) ("[E]vidence in mitigation is crucially important in death penalty litigation."); *Romano v. Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001) ("Mitigating evidence plays an overwhelmingly important role in the just imposition of the death penalty.") (internal quotations omitted). And the Courts of Appeals have found that when counsel has knowledge of potential mitigation evidence, counsel must conduct further investigation in order to be determined "effective" under *Strickland*. *See, e.g., Neal*, 286 F.3d at 236-38; *Coleman v. Mitchell*, 268 F.3d 417, 451 (6th Cir. 2001); *Mayfield v. Woodford*, 270 F.3d 915, 927-28 (9th Cir. 2001); *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999); *Emerson v. Gramely*, 91 F.3d 898, 907 (7th Cir. 1997); *Hill v. Lockhart*, 28 F.3d 832, 845 (8th Cir. 1994); *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994).

[24] The decision to re-try guilt in the mitigation phase, according to the lead attorney, was actually made before any evidence was presented in the guilt/innocence trial. JA 485-486.

conducting an investigation to determine what mitigating evidence existed.

II. Counsel's Deficient Performance Prejudiced The Defendant

A death penalty proceeding consists of *two* trials, one for guilt and the other for sentencing. *E.g.*, *Strickland*, 466 U.S. at 686-87 ("A capital sentencing proceeding ... is sufficiently like a trial in its adversarial format and the existence of standards for a decision, that counsel's role in the proceeding is comparable to counsel's role at trial.") (internal citations omitted); *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) ("[T]he capital sentencing proceeding is similar to a trial in its adversarial format and counsel's role is similar."). Rather than investigate the existence or substance of possible mitigating evidence for the sentencing trial, counsel in this case simply re-tried guilt because doing so required no additional work or effort. Counsel was unprepared for the sentencing (second) trial, as counsel abdicated the responsibility to prepare a case in mitigation.[25] Counsel's deficient performance prejudiced Wiggins as the evidence counsel failed to investigate and present had a "reasonable probability" of producing a different result in the sentencing proceeding.

[25] *See supra* notes 19-24.

A. A Decision Not to Investigate Mitigating Evidence Is Not a Tactical Decision, Rather It Is No Decision at All

The wholesale failure to mount a sufficient investigation for mitigating evidence in this case rendered counsel's performance deficient.[26] While under *Strickland,* defense counsel is not required to conduct a *complete* investigation of every possible avenue of defense, counsel has a duty to at least conduct a *sufficient* investigation and determine the content of available mitigating evidence. *See Strickland*, 460 U.S. at 690-91 ("[C]ounsel has a duty to make reasonable investigations"); *Williams*, 529 U.S. at 371 ("Counsel's failure to discover and present this and other significant mitigating evidence was 'below the range expected of reasonable, professional competent assistance of counsel.'") (citation omitted).[27] In no court proceeding does a party have more at stake than the defendant in a capital sentencing hearing, and accordingly, courts must be particularly vigilant in ensuring that capital defendants receive adequate legal counsel.[28] In this case,

[26] The failure to conduct an investigation and determine available sources of mitigating evidence prior to making a decision on whether or not to present such evidence should always be considered deficient performance by counsel in a capital case.

[27] *See supra* notes 19-24.

[28] *See Duckett v. Mullin*, 306 F.3d 982, 997 (10th Cir. 2002) (The "duty to conduct a reasonable investigation is particularly important with respect to the sentencing phase of a capital trial, and we have recognized a need to apply even closer scrutiny when reviewing attorney performance during the sentencing phase of a capital case.") (quotation marks and citations omitted); *accord St. Pierre v. Walls*, 297 F.3d 617, 632 (7th Cir. 2002) ("[T]his circuit has held defense counsel to a higher standard at the sentencing phase where death is a possible sentence."). A higher level of scrutiny is necessary because "[t]he

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however, counsel was generally aware of potential avenues of mitigation, but failed to investigate or determine the substance of mitigating evidence available for the sentencing phase. The Maryland Court of Appeals erroneously found this to be a "reasonable professional judgment," a holding that is inconsistent with decisions of this Court, and many decisions of the Courts of Appeals and State Supreme Courts interpreting and applying the same law in similar circumstances.[29]

1. The standard of requiring a "reasonable" investigation is guided by the relevancy and admissibility of such evidence in the sentencing phase

Counsel is required to undertake a "reasonable investigation" into potential mitigating evidence "supported by reasoned professional judgment." *Burger*, 483 U.S. at 788-96. Because of the unique nature of the capital sentencing hearing, counsel must at least *unearth* a

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sentencing stage is the most critical phase of a death penalty case." *Cooks v. Ward*, 165 F.3d 1283, 1294 (10th Cir. 1998); *accord Lesko v. Lehman*, 925 F.2d 1527, 1541 (3d Cir. 1991). Moreover, it is the proceeding in which counsel's efforts have the greatest chance of making a difference. *See Jermyn v. Horn*, 266 F.3d 257, 308 (3d Cir. 2001) ("[T]he sentencing phase of a capital case is often the stage of the proceedings where counsel can do his or her client the most good[.]"); *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995); *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989); *cf. Mayfield*, 270 F.3d at 942 (Hawkins, J., concurring) ("It is a painful truth of the death penalty process that these most serious cases sometimes draw the least adequate trial counsel.").

[29] *See supra* part I and *supra* notes 19-28. *See also Jermyn*, 266 F.3d at 308; *Glenn*, 71 F.3d at 1207; *Blanco v. Singletary*, 943 F.2d 1477, 1501-02 (11th Cir. 1991).

sufficient quantum of mitigating evidence to enable him to make a reasoned judgment that presenting mitigating evidence would be an unavailing strategy. *See Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989) ("[C]ounsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and focus the attention of the jury on any mitigating factors.").[30]

The requirement that counsel undertake a "reasonable investigation" must be tailored to the fact that the volume and character of the evidence presentable in a capital sentencing hearing is starkly different than evidence appropriate for trial. *See St. Pierre v. Walls*, 297 F.3d 617, 632 (7th Cir. 2002) ("[N]early anything is admissible in mitigation, regardless of whether it would be admissible at trial."); *Bracy v. Schomig*, 286 F.3d 406, 412-19 (7th Cir. 2002) (en banc) ("[W]e are again mindful that *death is indeed different*" and that "evidence in mitigation is *crucially* important in death penalty litigation.") (emphasis added). The nature of a capital sentencing proceeding – considering the finality of the penalty, the role of the jury, and the admissibility of nearly any possible information – requires fresh and additional efforts on the part of defense counsel to constitute a "reasonable investigation." *See Burger*, 483 U.S. at 822 (Powell, J., dissenting) ("Where information at the sentencing stage in a capital case may be highly relevant, counsel's burden of justifying a failure to investigate or present it is similarly heightened."). The fact that counsel undertook no such efforts in this case

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[30] *See supra* notes 19-29.

demonstrates counsel's actions could not possibly have been "supported by reasoned professional judgment." *Burger*, 483 U.S. at 788-96.

2. Counsel must investigate and determine if evidence exists in several key areas before making a "strategic" decision not to conduct any further investigation or present such evidence

Effective capital counsel must investigate defendant's background for several types of mitigating evidence, including education and mental ability,[31] and family background and upbringing[32] – the same categories of mitigating evidence that were not investigated and presented in Wiggins' case.

a. education and mental ability

Mental retardation and a history of abuse are factors the jury must be allowed to consider. *See Penry v.*

[31] In many cases a writ of habeas corpus has been granted based on counsel's failure to investigate mitigating evidence of a defendant's mental ability. *See, e.g., Brownlee v. Haley*, 306 F.3d 1043, 1074 (11th Cir. 2002); *Caro*, 280 F.3d at 1255; *Coleman*, 268 F.3d at 452; *Jermyn*, 266 F.3d at 310-11; *Lockett*, 230 F.3d at 714; *Glenn*, 71 F.3d at 1209; *Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir. 1995).

[32] Similarly, in many cases a writ of habeas corpus has been granted when counsel failed to investigate evidence of the defendant's family background. *See, e.g., Williams*, 529 U.S. at 395 (counsel failed to investigate "records graphically describing [defendant's] nightmarish childhood); *Neal*, 286 F.3d at 244; *Silva v. Woodford*, 279 F.3d 825, 850 (9th Cir. 2002); *Ainsworth*, 268 F.3d at 878; *Moore*, 194 F.3d at 616; *Dobbs*, 142 F.3d at 1388; *Brewer v. Aiken*, 935 F.2d 850, 858 (7th Cir. 1991).

Lynaugh, 492 U.S. 302, 322-23 (1989); *see also Waters v. Thomas*, 46 F.3d 1506, 1524 (11th Cir. 1995).

b. family background and upbringing

"Evidence of a difficult family history and of emotional disturbance," the type of evidence "typically introduced by defendants in mitigation," cannot be excluded from the jury's consideration. *Eddings*, 455 U.S. at 115; *see also McGautha v. California*, 402 U.S. 183, 187-88 (1971).

c. age

Although not an issue in this case, juries must be allowed to consider evidence of a capital defendant's youth when appropriate. *See, e.g., Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Eddings*, 455 U.S. at 115-16; *Battle v. Delo*, 19 F.3d 1547, 1558 (8th Cir. 1994).

The failure of counsel to investigate the existence of evidence "typically introduced by defendants in mitigation" is deficient performance because it precludes the jury from rendering the appropriate sentence based on the individual defendant's overall moral culpability. *See Eddings*, 455 U.S. at 115-16.

3. Counsel's actions failed to comport with prevailing professional standards of competent capital counsel throughout the United States and in Maryland

In *Strickland*, this Court stated that counsel's performance is measured, in part, by prevailing professional standards. 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness

under prevailing professional norms."). Some standards for the competency of capital counsel will be clearly pronounced and written,[33] other standards may be unwritten,

[33] Illinois has a "capital bar", setting minimum requirements for counsel to become certified to try capital cases. *See* IL. S.CT. R. 714.

> Lead Counsel – Qualifications
>
> (1) Be a member in good standing of the Illinois Bar or be admitted to the practice *pro hac vice*.
>
> (2) Be an experienced and active trial practitioner with at least five years of criminal litigation experience.
>
> (3) Have substantial familiarity with the ethics, practice, procedure and rules of the trial and reviewing courts of the State of Illinois.
>
> (4) Have prior experience as lead or co-counsel in no fewer than eight felony jury trials which were tried to completion, at least two of which were murder prosecutions; and either
>
> (i) have completed at least 12 hours of training in the preparation and trial of capital cases in a course approved by the Illinois Supreme Court, within two years prior to making application for admission; or
>
> (ii) have substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, mental health, pathology and DNA profiling evidence.

In February, 1989, the ABA House of Delegates adopted Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Resolution of the ABA House of Delegates (Feb. 1989). According to the ABA guidelines that were in effect when Wiggins was convicted and sentenced to death in 1989, his attorneys had a duty to investigate "the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." 1 A.B.A. STANDARDS FOR CRIMINAL JUSTICE (1982 Supp.), No. 4-4.1. This included the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Defense counsel's decision not to seek additional mitigating evidence by investigating petitioner's family or childhood background was therefore not within the range of professionally reasonable judgments.

but nevertheless apparent. *Id.* at 688-89 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, are guides to determining what is reasonable"). Where the professional norms are "prevailing", either through written requirements or standard procedures, this Court should find that counsel's failure to meet those norms renders their performance deficient. *Cf. Gideon v. Wainwright*, 372 U.S. 335, 340-45 (1963) ("In returning to these old precedents, sounder than we believe the new, we but restore constitutional principles established to achieve a fair system of justice."); *Strickland*, 466 U.S. at 704-05 (Brennan, J., concurring and dissenting) ("Time and time again this Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case."); *accord Powell v. Alabama*, 287 U.S. 45, 71-72 (1932); *Barefoot v. Estelle*, 463 U.S. 880, 913-14 (1936) (Marshall, J., dissenting); *Woodson*, 428 U.S. at 304; *Gardner v. Florida*, 430 U.S. 349 (1977); *Lockett*, 438 U.S. at 605-06 (opinion of Burger, C.J.); *Green v. Georgia*, 442 U.S. 99 (1979); *Beck v. Alabama*, 477 U.S. 625 (1980); *Bullington v. Missouri*, 451 U.S. 430 (1981); *Eddings*, 455 U.S. at 110-16.

There was a prevailing local professional standard in this case which was clearly disregarded by counsel, rendering their performance deficient.[34] It was a standard

[34] Also, counsel's performance in this case fell below nationwide standards of professional competent capital counsel, as evidenced by the ABA standards of competence. *See supra* note 33. Moreover, counsel did not present a mitigating case because counsel made the decision to re-try guilt in the mitigation phase *before* any evidence was even presented in the guilt/innocence trial. JA 485-486. Counsel's decision

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practice in the Maryland Public Defenders' Office to prepare social histories of capital defendants, and funds were provided specifically for an expert to prepare a social history. Although counsel was aware of these professional norms, they simply disregarded them. Counsel's performance was lacking because they did not comply with this prevailing professional norm by failing to engage an expert to prepare a social history of Wiggins.[35] *See also Burger*, 483 U.S. at 811-12 (Blackmun, J., dissenting) ("It is also important to 'keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'").

B. Defendant Suffered Prejudice In This Case Because Counsel Failed to Investigate The Existence of Mitigating Evidence

The purpose of mitigating evidence is to allow for individualized sentencing. However, the defendant is deprived of the right to individualized sentencing when his

was therefore never reasonably informed and cannot be considered tactical.

[35] No argument can be made that the prosecution's death penalty aggravation case was "adversarially tested" in this case. Rather, the case for guilt was re-tested in the *sentencing* trial, despite the fact the jury was repeatedly instructed that the defendant was already found guilty and they were to take the finding as dispositive on the issue. JA 53, 362. ("This conviction is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact."). The State cannot claim that the aggravation case presented was in any way rebutted or "tested" by the re-argument over guilt, considering the trial court's instruction to the jury. Due to the instruction, the only possible way to subject the prosecution's aggravation case to "adversarial testing" was to present a mitigating case.

own counsel fails to investigate what it is that makes him an individual. *See Williams*, 529 U.S. at 393 ("[I]t is undisputed that Williams had a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer."). Thus, the failure to investigate mitigating evidence deprives the defendant of the right to effective counsel. *See, e.g., id.*; *Strickland*, 466 U.S. at 694 ("An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be lower."). In this case, counsel's failure to investigate, obtain, or present any mitigating evidence – let alone the powerful, concrete, and specific mitigating evidence that was available – prevented the jurors from hearing any humanizing information about Wiggins.[36] Hence, there is a reasonable probability that if the jury had learned of Wiggins' lack of a prior criminal record,[37] borderline mental retardation,

[36] *See Brownlee*, 306 F.3d at 1074 (granting habeas relief, finding that the defendant had been prejudiced when his counsel failed to investigate and present mitigating evidence).

[37] Wiggins' background could not have aggravated the threat that he would be dangerous in the future, and in any event the crime he was convicted of was not more heinous than the one committed in *Williams*, 529 U.S. at 367-69. Other courts have found prejudice for failing to investigate mitigating evidence on facts that were similar or less favorable than the facts of this case. *See Lockett*, 230 F.3d at 710-15 (finding prejudice even though the jury could have concluded that the defendant's "mental problems aggravated the threat of future dangerousness," and despite "the undeniable gravity, cruelty and deliberateness of the crimes that [defendant] committed: a calculated double-murder – involving an ambush, multiple shootings, kidnapping and execution – of an innocent couple."); *Silva*, 279 F.3d at 847-50; *Coleman*, 268 F.3d at 452-53; *Jermyn*, 266 F.3d at 309-12; *Battenfield v. Gibson*,

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and the abuse he suffered as a child that the outcome would have been different.[38]

1. Wiggins suffered prejudice because there is a reasonable probability that at least one hypothetical juror could have found the mitigating evidence not presented persuasive and voted to spare Wiggins' life

When seen through the prism of jurors as individual moral deliberators, *Strickland*'s "reasonable probability" test tolerates *less error* during death penalty sentencing than during the guilt phase of the trial.[39] The capital

236 F.3d 1215, 1235 (10th Cir. 2001); *Kenley v. Armontrout*, 937 F.2d 1298, 1308-09 (8th Cir. 1991); *Brewer*, 935 F.2d at 858-59.

[38] *See Williams*, 529 U.S. at 391-99 ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."); *Penry*, 492 U.S. at 328 (in capital cases, the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.") (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion)); *see also Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997); *Loyd v. Whitley*, 977 F.2d 149, 160 (5th Cir. 1992); *Armstrong v. Dugger*, 833 F.2d 1430, 1434 (11th Cir. 1987).

[39] When deciding whether to apply the death penalty to a particular defendant, the jury must provide a "reasoned *moral* response." *Penry*, 492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original)). The "reasoned moral response" weighs the particularized evidence of a defendant's moral culpability against the twin social purposes served by capital punishment: retribution and deterrence. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). The severity of the appropriate punishment necessarily depends on the "personal responsibility and *moral* guilt" of the particular defendant. *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (emphasis added). The jury must treat the defendant as a "'uniquely individual

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sentencing process depends upon the jurors' moral values and judgment, and each juror's own moral belief operates as the independent standard by which the evidence is *weighed* and compared to the mitigating and aggravating factors.[40] *See Jurek v. Texas*, 428 U.S. 262, 272-73 (1976) (plurality opinion). Given the diversity of opinion in the United States on when, and under what circumstances, the death penalty is a proportionate penalty,[41] it follows

human bein[g].'" *Penry*, 492 U.S. at 319 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

[40] *See* MD. CODE ANN., ART. 27 § 413 (listing various mitigating circumstances the jury may consider and stating "a decision to impose a death sentence must be unanimous"). Courts cannot bar jurors who harbor some moral reservations about the appropriateness of the death penalty. Subject to one well-established exception, this Court has yet to permit morally defined restrictions on who may sit as a juror in a capital case. Only jurors with categorical moral dispositions toward the application of the death penalty may be struck for cause. *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (holding that jurors who would apply the death penalty regardless of any mitigating evidence may be struck for cause); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (holding that jurors who would categorically refuse to apply the death penalty may be struck for cause). Thus, a juror may be struck for cause, not simply on the basis of the juror's moral beliefs, but on the juror's expressed and specific intent to ignore the evidence presented at the sentencing phase. *Witt*, 469 U.S. at 424.

[41] Public opinion shows that potential jurors support the imposition of the death penalty in only narrow circumstances not present in this case. According to the 2002 year end report issued by the Death Penalty Information Center, public opinion remains divided on whether the death penalty or a sentence of life without the possibility of parole is the most appropriate sentence for first degree murder. Richard C. Dieter, *The Death Penalty In 2002: Year End Report*, Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/yrendrpt02.pdf (last visited Jan. 6, 2002). A May 7, 2002 ABC News poll found that 65% of Americans support the death penalty when no alternative is offered. ABC News, May 7, 2002, *available at* http://abcnews.go.com/sections/us/DailyNews/deathpenalty_poll020507.

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that there is normally a reasonable probability that at least one of the twelve jurors had some moral reservations about the application of the death penalty in this case.[42]

html (last visited Jan. 6, 2002). When given the sentencing option of life without the possibility of parole, 46% of Americans support the death penalty. *Id.* Support for the death penalty has declined since the early 1990's, and despite the recent terrorist attacks. According to a recent Gallup poll, in general, 72% of Americans favor the death penalty for defendants convicted of murder and 25% oppose it. Gallup News Service, May 20, 2002, *available at* http://www.gallup.com/poll/topics/ (last visited May 20, 2002). Fifty-three percent of Americans believe the death penalty is applied fairly, while 40% say it is applied unfairly. *Id.* Eighty-two percent oppose the death penalty for the mentally retarded, 73% oppose the death penalty for those who are mentally ill, and 69% oppose capital punishment for juvenile offenders. *Id.*

This reduced public support for the death penalty appears to be playing out in courtrooms across the country. According to the U.S. Department of Justice, the total number of death penalty sentences in 2001 was 155, the lowest number of death sentences since 1979. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PUB. NO. 197020, CAPITAL PUNISHMENT 2001, 9-13 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf. The total number of death sentences in 2001 was also down significantly from the average of 296 death sentences per year between 1994 and 2000. *Id.*

[42] *Cf. Atkins v. Virginia*, 122 S.Ct. 2242, 2247 (2002) (noting that whether a punishment is "excessive" is judged by the standards "that currently prevail"). Most states commit capital sentencing decisions to juries, *see Ring v. Arizona*, 122 S.Ct. 2428, 2442 n.6 (2002), and those states require unanimity, so that a single juror can preclude a death sentence. *See, e.g.*, MD. CODE ANN., ART. 27 § 413; 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2002); N.Y. CRIMINAL PROCEDURE LAW § 400.27 (McKinney 2001); 42 PA. CONS. STAT. § 9711 (1998); *see also Atkins*, 122 S.Ct. at 2247 ("We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'") (citation omitted). Therefore, based on the state's statutes, the question should focus on the probability of the mitigating evidence to sway a *single* juror.

In applying the *Strickland* test, the court cannot average all jurors into one "reasonable juror," as it would in cases involving error during the guilt phase of the trial. *See Ring*, 122 S.Ct. 2442-43 ("'The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which the law should be enforced and justice administered.'") (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)). In the guilt phase, the law presumes uniform application of the universal rules of logic and inference by different jurors.[43] By contrast, in the penalty phase, even though moral rules are often presumed to have universal applicability, there is no requirement of acceptance of a particular set of moral rules.[44] Thus, there is a reason, based on law and fact, to presume that the jurors did not all share a common or universal set of moral precepts and values.[45]

Therefore, in cases involving ineffective assistance of counsel at the death penalty sentencing phase, the prejudice test under *Strickland* must focus on the reasonable probability that counsel's unprofessional errors and the omitted mitigating evidence would have affected *one* hypothetical juror with some moral reservations about the

[43] Not only are there no principled reasons to differentiate among the jurors based upon their intellectual capacities, but courts do not hypothesize differences among jurors. *See, e.g., Penry*, 532 U.S. at 804.

[44] *See supra* notes 39-43.

[45] The reasoning of this Court's decisions in *Ring* and *Penry* combined with the unanimity requirement imposed by the states, *see supra* note 42, demands that each *juror* provide an *individualized* "reasoned moral response" based upon the evidence adduced at sentencing.

application of the death penalty.[46] *See, e.g., Emerson*, 91 F.3d at 907 (stating that the defendant "need[ed] to convince only one of twelve jurors to refuse to go along with a death sentence" and that the unused mitigation report likely would "reduce [petitioner's] moral responsibility for the murder . . . to a level at which capital punishment would strike that juror as excessive or one or more of the jurors would think [petitioner] deserving of mercy.").

2. The mitigation evidence not presented could, in all probability, have spared Wiggins' life

Compelling mitigation evidence existed in this case, which in all probability, if presented to the jury, could have spared Wiggins' life.[47] More importantly, the omitted evidence comported with and supported the argument that Wiggins lacked sufficient culpability for the crime to impose the death penalty. Wiggins is "borderline intelligent" with

[46] *See supra* note 41 on public opinion regarding imposition of the death penalty.

[47] Further compounding the error is the fact counsel failed to conduct an investigation for mitigating evidence despite the fact that it is "a routine practice in the Maryland Public Defender's Office," and that funds were available to hire an expert to prepare a social history of Wiggins. JA 472-78, 485-88, 514-15, 539-40; *see also Wiggins*, 164 F. Supp. 2d at 559-60; *supra* Part II.A.3 (discussing prevailing professional standards).

an IQ of 72 and possibly mentally retarded.[48] An examination of Wiggins at age 18 revealed cranial pathology and possible head trauma and indicated mental retardation.[49] Wiggins had no prior criminal record.[50] Wiggins suffered through a horrific, abusive childhood.[51] As a child, he was frequently left alone for days at a time and was forced to beg or eat refuse.[52] He was beaten, and even burned on one occasion by his mother.[53] The abuse caused Wiggins to be placed in foster care when he was six.[54] However, he suffered even more abuse in foster care, being beaten and repeatedly sexually molested and raped.[55] This significant mitigating evidence, if presented, had a reasonable probability to change the outcome of the proceeding.[56] Together this mitigating evidence makes a convincing case for sparing Wiggins' life, and this omitted evidence, if presented, had the reasonable probability of persuading at

[48] JA 437-39. Although it is not known if Petitioner is legally mentally retarded, Maryland does not execute the mentally retarded and did not do so at the time of Wiggins' trial, *see* MD. CODE ANN., ART. 27 § 412, and reduced mental capacity is a mitigating factor, *see* MD. CODE ANN., ART. 27 § 413.

[49] JA 435-447.

[50] JA 17-24. The lack of a prior criminal record has bearing on the question of whether Wiggins posed a future danger to society. *Wiggins*, 164 F. Supp. 2d at 559-60.

[51] JA 425-444.

[52] JA 428-430.

[53] JA 429-431.

[54] JA 431-432.

[55] JA 432-444.

[56] *See supra* note 41 (restating numbers from recent polls of Americans on death penalty issue).

least one member of the jury that death was not the proper sentence in this case.

CONCLUSION

The Maryland court's decision was an unreasonable application of *Strickland*, as the failure to perform a sufficient investigation for mitigating evidence before making a decision to forgo additional investigation or not to introduce any mitigating evidence is not a tactical decision. Wiggins suffered prejudice in this case because the evidence counsel failed to investigate and present was compelling and, in all probability, if presented to the jury, could have spared Wiggins' life. This Court should therefore find the Maryland Court of Appeals unreasonably applied *Strickland* and reverse the Fourth Circuit's ruling.

Respectfully submitted,

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